(3)

No. 03-60

In the Supreme Court of the United States

DIANA LEBRETON

Petitioner

versus

PENDLETON MEMORIAL METHODIST HOSPITAL, PATRICK C. BREAUX, M.D., FELIX O. RABITO,M.D. and THOMAS A. KREFFT, M.D.

Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE LOUISIANA SUPREME COURT

BRIEF OF PENDLETON MEMORIAL METHODIST HOSPITAL IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether or not this Honorable Court should exercise its discretionary review under 28 USC 1257(a) to grant a writ of certiorari to review determinations of state law made by the Louisiana Supreme Court.

PARTIES TO THE PROCEEDING

1) Dr. Diana LeBreton

2) Pendleton Memorial Methodist Hospital

3) Patrick C. Breaux, M.D.

4) Felix O. Rabito, M.D.

5) Thomas A. Krefft, M.D.

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OPINIONS BELOW AND JURISDICTIONAL STATEMENT

The opinions below and jurisdictional statement were presented correctly by the petitioner.

STATUTORY PROVSIONS INVOLVED

This case involves Louisiana Revised Statute 9:5628.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2003

DR. DIANA LEBRETON
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versus

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STATEMENT OF THE CASE

This is ostensibly a medical malpractice action arising out of medical treatment rendered to Albert LeBreton, Jr. at Pendleton Memorial Methodist Hospital (PMMH) over a decade ago. The plaintiff, Mr. LeBreton's daughter, has sued PMMH and three physicians involved in the decision (admittedly supported by Mr. LeBreton's wife, the plaintiff's mother) to terminate her father's life support following his apparent heart attack in August of 1991. The present action is the second action filed by the plaintiff arising out of the death of her father.

The plaintiff filed her first action, a wrongful death claim, in the Civil District Court for the Parish of Orleans on August 18, 1992. In that action, she sued only the three physicians,[1] alleging that the "deliberate act of euthanasia" by the physicians caused her father's death. The following day, on August 19, 1992, the plaintiff also filed a request for review by a medical review panel pursuant to the Medical Malpractice Act, La. R.S. 40:1299.41 et seq. Pursuant to the Medial Malpractice Act, the defendants filed exceptions of prematurity in the civil district court action, which were granted by the trial court, dismissing the plaintiff's action without prejudice.

On August 12, 1996, the medical review panel issued its opinion in favor of the three physician defendants, finding that no medical malpractice had occurred. Plaintiff's attorney was notified of the opinion on August 14, 1996, but did not refile the civil district court action until over five months later. Because Lousiana requires that suit be instituted within ninety days of the receipt of the medical review panel opinion, the physician defendants filed exceptions of prescription, which were maintained by the Louisiana Supreme Court after being initially overruled by the trial court and court of appeal. The Supreme Court's judgment dismissed the plaintiff's action with prejudice.

Nearly a decade after Mr. LeBreton's death and over three years after the Louisiana Supreme Court's decision dismissing the plaintiff's action as prescribed, the plaintiff filed the present action arising out of the very same facts and

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[1] PMMH was not sued in the plaintiff's first action.

circumstances as her first action. The second action differed from the first action only in that the plaintiff's petition included PMMH as a defendant and purported to make claims based upon the Louisiana Unfair Trade Practices and Consumer Protection Law and the due process clause of the Louisiana Constitution.

In response to the plaintiff's petition in the present action, the physician defendants filed exceptions of *res judicata*, prescription, peremption, and no right/cause of action.

PMMH filed an exception of prescription, along with exceptions of peremption, no right of action, and no cause of action. The trial court maintained the physician defendants' exception of *res judicata* and PMMH's exception of prescription, and ruled that the remaining exceptions were moot:

> IT IS HEREBY ORDERED, ADJUDICATED AND DECREED that the Exception of *Res Judicata* filed by Drs. Breaux and Rabito be and hereby is maintained; and the Exception of Prescription filed by Pendleton Memorial Methodist Hospital be and hereby is maintained; because of this ruling the other Exceptions filed by the defendants are moot; and all of plaintiff's claims are dismissed with prejudice.

See Judgment of the Trial Court, contained in Petitioner's Appendix 1, page 2.

In the court's reasons for judgment,[2] the court was likewise clear that while the physician defendants were dismissed on the basis of *res judicata*, the dismissal of PMMH was based upon prescription:

> The earlier judgment in connection with plaintiff's wrongful death claim filed in August 1992 maintaining the Exceptions of Prescription filed by Drs. Rabito, Breaux, and Krefft constituted a final judgment. Louisiana's *res judicata* doctrine bars relitigation of claims and issues arising out of the same factual circumstances if there is a valid final judgment. *Duffy v. SI-SIFH Corp.*, 726 So. 2d 438 (La. App. 4th Cir. 1999). Therefore, the Exception of Res Judicata filed by defendants, Patrick M. Breaux, M.D. and Felix O. Rabito, M.D. is granted.
>
> Additionally, the Exception of Prescription filed by Pendleton Memorial Methodist Hospital is granted. The cause of action subject of the instant suit occurred in August 1991. La. R.S. 9:5628 provides a three year prescriptive period from the date of the alleged malpractice in which to file suit. Clearly, plaintiff's claim has prescribed and Ms. LeBreton has not carried her burden of proving an interruption or suspension of prescription.

See Petitioner's Appendix 1 at page 5.

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[2] Plaintiff filed a motion to set aside the trial court's judgment on grounds unrelated to PMMH. The court then issued another Final Judgment, (Petitioner's Appendix 1 at page 3), and Reasons for Judgment (Petitioner's Appendix 1 at page 5).

The plaintiff then appealed the trial court's judgment. In her motion for appeal, the plaintiff did not specify as to which defendants and/or which portions of the trial court's judgment she was appealing. Similar to her United States Supreme Court brief, wherein PMMH is named as a respondent but not discussed in the body of the brief, the plaintiff named PMMH as an appellee, but described only the *res judicata* component of the trial court's ruling.

Similarly, the plaintiff's Original Brief on appeal discussed only the *res judicata* component of the trial court's ruling; nowhere in her Assignment of Errors, Issues Presented for Review, or Argument did the plaintiff raise any arguments relating to the trial court's ruling granting PMMH's exception of prescription. See Petitioner's Appendix 1 at page 7, et seq.

The Court of Appeal for the Fourth Circuit of Louisiana unanimously affirmed the district court's judgment maintaining the physician defendants' exceptions of *res judicata* and PMMH's exception of prescription. See Petitioner's Appendix 1 at 14.

Plaintiff then applied for a writ of certiorari and/or review to the Louisiana Supreme Court, which unanimously denied the request.

From that denial, petitioner has brought the present writ application.

SUMMARY OF ARGUMENT

Petitioner's writ application presents no special and important reasons for granting the writ of certiorari. None of the considerations found in Rule 10 of the Rules of the Supreme Court are present in this case. The claims against PMMH are prescribed by operation of state law. Petitioner's repeated and incomprehensible suggestions that the physician defendants and the Louisiana Supreme Court violated constitutional law are unsupported. However, even if this Court were to somehow determine that the petitioner had raised cognizable legal issues with regard to the lower court determinations of *res judicata*, nowhere in the petitioner's brief does she address the fact that PMMH was dismissed pursuant to an exception of prescription, which was clearly supported by Louisiana state law.

Because the petitioner's writ application does not address the trial court's ruling that her claim against PMMH is prescribed, PMMH is unsure whether the plaintiff intended to seek review of this issue. Out of an abundance of caution, PMMH has filed this respondent's brief.

ARGUMENT

THE CONSIDERATIONS FOUND IN RULE 10 OF THE RULES OF THE SUPREME COURT ARE NOT PRESENT IN THIS CASE

Rule 10 of the Rules of the Supreme Court provides in part:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a

writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers.

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b)a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

As is clear from a review of Petitioner's Questions Presented, none of the "character of reasons" found in Rule 10 are present in this case.

PETITIONER'S CLAIMS AGAINST PMMH ARE PRESCRIBED BY OPERATION OF STATE LAW

Petitioner, Dr. Diana M. LeBreton, filed the lawsuit to which her writ of certiorari is related on August 17, 2001 essentially alleging that on or about August 13, 1991, her father, Albert L. LeBreton, Jr., was admitted to PMMH after suffering an apparent heart attack; that he was revived in the Emergency Room and moved to the ICU; that he remained in the ICU until August 18, 1991; that during that time he was intubated and given water and antibiotics intravenously; that during the morning of August 18, 1991, Dr. Patrick Breaux ordered the removal of the feeding tubes and IVs; that as a result of the removal of the feeding tubes and IVs Mr. LeBreton died on August 20, 1991. She further alleged that she vigorously objected to the decision to take Mr. LeBreton off life support. Petitioner also alleged violations of The Louisiana Constitution and The Louisiana Unfair Trade Practices Act.

Because plaintiff's claims arise out of the medical treatment of her father, they are medical malpractice claims under Louisiana law. See Louisiana Revised Statute 40:1299.41, et seq. As such, they are subject to the prescriptive/peremptive periods provided by Louisiana Revised Statute 9:5628. Pursuant to that statute, a plaintiff has one year from the date of the alleged act, omission or neglect, or one year from the date of discovery of the alleged act, omission or neglect within which to institute suit. However, Louisiana Revised Statute 9:5628 also provides that even as to claims filed within one year of the date of discovery, all claims must be filed, at the latest, within a period of three years from the alleged act, omission or neglect. Clearly, the causes of action pled by plaintiff

against PMMH, which were filed almost ten years after the alleged act, omission or neglect, are prescribed as a matter of Louisiana law.

Louisiana law is clear that "the burden of proof is normally on the party pleading prescription; however, if on the face of the petition it appears that prescription has run ... the burden shifts to the plaintiff to prove a suspension or interruption of the prescriptive period." *Younger v. Marshall Industries, Inc.*, 92-3134 (La. 5/24/93); 618 So. 2d 866, 869; *Wimberly v. Gatch*, 93-2361 (La. 4/11/94); 635 So. 2d 206. Because medical malpractice, wrongful death and survival actions prescribe one year from the date of the alleged malpractice or death, and because the August 17, 2001 complaint naming PMMH as defendant was filed almost ten years after Mr. LeBreton's death and the alleged malpractice, the complaint prescribed on its face and petitioner bore the burden at the hearing of this matter to prove an interruption or suspension of prescription.

Petitioner was unable to sustain her burden of proving an interruption or suspension of prescription. Because petitioner's claims were filed almost ten years after the date of the alleged malpractice, her claims were prescribed pursuant to Louisiana law and the Louisiana courts were correct in dismissing petitioner's claims against PMMH.

STATUTES OF LIMITATION CARRY A STRONG PRESUMPTION OF CONSTITUTIONALITY

Statutes of limitation, such as the prescriptive/peremptive periods provided by Louisiana Revised Statute 9:5628, represent pervasive legislative judgments that it is unjust to

fail to put one's adversary on notice that it will be necessary defend a claim within a certain period of time. *U. S. v. Kubrick*, 100 S.Ct. 352, 444 U.S. 111, 62 L.Ed.2d 259.

"It is generally within the sound discretion of the legislature to enact statutes of limitation. Such statutes carry a strong presumption of constitutionality." *Brubaker v. Cavanaugh*, 741 F.2d 318 (C.A.10 1984), citing *Flemming v. Nestor*, 80 S.Ct. 1367, 1376, 363 U.S. 603, 617, 4 L.Ed.2d 1435.

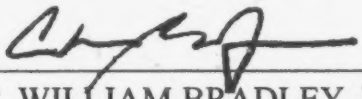
CONCLUSION

Petitioner has offered no evidence that the state courts who have examined this case applied the wrong statute of limitations to her claims against PMMH. Nor has she suggested that the statute of limitations is unconstitutional. She has offered no such arguments because there is no basis for such arguments. Petitioner's claims arise from allegations of medical malpractice as defined by Louisiana law. The applicable statute of limitations, which enjoys a presumption of constitutionality, clearly requires that all claims must be brought within 3 years of the date of the alleged malpractice. Petitioner failed to put PMMH on notice that it might have to defend claims arising from the decision of her mother to discontinue life support to her father in its facility for a period of about 10 years. The state courts who examined petitioner's claims properly determined that her claims against PMMH had prescribed.

Petitioner's claims, even if they met the requirements of Rule 10, which they do not, are time barred as to PMMH. Petitioner's writ application is absolutely devoid of any argument explaining either that the applicable statute of limitation is unconstitutional or that it does not apply to her claims against PMMH. Petitioner's failure to comply with the statute of limitations and her failure to set forth an argument that the statute was either improperly applied or was unconstitutional requires that her writ application be denied as it relates to PMMH.

Respectfully submitted,

Lemle & Kelleher, L.L.P.

BY: 

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